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10/625,605	07/24/2003	Alberto Peisach	60783.000005	7920

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EXAMINER

BUTLER, PATRICK

ART UNIT PAPER NUMBER

1732

DATE MAILED: 07/25/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/625,605	PEISACH ET AL.	
	Examiner	Art Unit	
	Patrick Butler	1732	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 May 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 15, 17-19 and 21-31 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 15, 17-19 and 21-31 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 24 July 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 19 May 2006 has been entered.

Response to Amendment

The Applicant's Amendments and Accompanying Remarks, filed 19 May 2006, have been entered and have been carefully considered. No claims are new, Claims 15, 18, and 28 are amended, Claim 20 is canceled, and Claims 15, 17-19, and 21-31 are pending.

In view of Applicant's amendment of claim 28 to remove the adhesive quantity, the Examiner withdraws the previously set forth 35 U.S.C. § 112 second paragraph rejection as detailed in the Claim Rejections 35 U.S.C. § 112 section of the Office Action dated 19 December 2005.

Despite these advances, the invention as currently claimed is not found to be patentable for reasons herein below.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 15, 17, 19, and 21-31 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 15 recites the limitation "the heated polymer" in the fourth line of text. There is insufficient antecedent basis for this limitation in the claim. Claim 17 is rejected via its dependency. For purposes of examination, the examiner assumes that a step of heating the polymer is present.

Claim 15 recites the limitation "the cavity" in the thirteenth line of text. There is insufficient antecedent basis for this limitation in the claim. This is because there are two cavities rather than just one. There is the cavity at the mouth and the cavity between the internal container wall and the bottom surface. Claim 18 contains the same insufficient antecedent in fourteenth line of text. Claims 17, 19, and 21-31 are rejected via their dependency. For purposes of examination, the examiner assumes that the cavity is the cavity of the mouth.

Claims 26-31 describe aspects of the method, such as in Claim 26, having an adhesive within the plastic to be formed. However, the claims recite "the plastic container" at the beginning of the claim, as if it were a product claim. Therefore, it is unclear whether the applicant intends for the invention is a product or method. For purposes of examination, the examiner assumes the claims to address the method.

Claims 21 depends from a canceled claim (Claim 20). Therefore, it is unclear which previous claim Applicant intends to depend Claim 21 from. Claims 22-31 are

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rejected via their dependency from Claim 21. For purposes of examination, the examiner assumes dependency to Claim 18.

Claim 15 describes the curved surface as "convex to the cavity." It is unclear how "to the cavity" is meant. Does the wall curve toward the cavity on the cavity side? Is the thickness constant, or is the wall convex on both sides? Does the wall curve away from the cavity? For purposes of examination, the examiner assumes that applicant intends for the wall to be convex viewed from below the bottom surface and concave viewed from the mouth cavity. Claim 18 contains the same ambiguous language. Claims 17, 19, and 21-31 are rejected via their dependency.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 15 and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by Jonas et al (5,234,126).

With regard to claim 15, Jonas et al teach a method for forming a plastic container for hot-filled food product (abstract; claim 1), comprising: selecting at least one polymer for a plastic container (column 13, lines 57-68); and forming the plastic container from the heated polymer (column 14, lines 1-5); wherein the plastic container comprises: a mouth; a bottom surface; and a container wall between the mouth and the bottom surface (column 8, lines 59-68), wherein the bottom surface of the container is

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formed to consist of a curved surface contiguous to a concentric sleeve, wherein the curved surface is convex to the cavity of the container and the concentric sleeve is proximate to both the curved surface and the container wall (column 5, lines 19-27; Fig. 3 [see outwardly deflected portion of bottom surface]), wherein further the concentric sleeve is substantially planar between the curved surface and the container wall (see Fig. 2's concentric sleeve). Jonas further teaches that the outwardly flexed bottom surface or the container wall is configured to flex inward into the cavity of the plastic container during cooling of the plastic container following hot-filling of the container with food product; wherein further the inward flexing of the bottom surface of the container wall reduces a pressure differential between the inside of the container and atmospheric pressure when either the container is hot-filled with food product or when the container is transported from a locale of lower atmospheric pressure to higher atmospheric pressure (claim 1); and wherein further the non-flexing surface maintains the same form from prior to hot-filling or transport, wherein further the flexing surface maintains its inwardly flexed configuration following cooling of the hot-filled container (claim 1; see column 5, lines 19-27).

The examiner recognizes that all of the claimed effects and physical properties are not positively stated by the reference(s). Note however that the references teach all of the claimed ingredients, process steps and process conditions and thus, the claimed effects and physical properties would necessarily be achieved by carrying out the disclosed process. If it is applicants' position that this would not be the case: (1) evidence would need to be presented to support applicants' position; and (2) it would be

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the examiner's position that the application contains inadequate disclosure in that there is no teaching as to how to obtain the claimed properties and effects by carrying out only these steps.

With respect to the preamble and content of Claim 15 about what the container is for (packaging a hot-filled food product), a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. As it is capable of performing the use, it meets the claim. It is also noted that an actual step of packaging a hot-filled food product is absent.

With regard to claim 17, Jonas et al teaches forming the container may comprise extrusion, injection molding, and blow molding (column 14, lines 1-5).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Jonas et al (5,234,126).

With regard to claim 18, Jonas et al teach a method for forming a plastic container with a selectively deformable surface (abstract), comprising: selecting at least one polymer for a plastic container (column 13, lines 57-68); and thermoforming a

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container from the heated polymer (column 14, lines 1-5); wherein the plastic container comprises: a mouth; a bottom surface; and a container wall between the mouth and the bottom surface (column 8, lines 59-68), wherein the bottom surface of the container is formed during thermoforming to consist of a curved surface contiguous to a concentric sleeve, wherein the curved surface is convex to the cavity of the container and the concentric sleeve is proximate to both the curved surface and the container wall (column 5, lines 19-27; Fig. 3 [see outwardly deflected portion of bottom surface]), wherein further the concentric sleeve is substantially planar between the curved surface and the container wall (see Fig. 2's concentric sleeve). Jonas further teaches that the outwardly flexed bottom surface or the container wall is configured to flex inward into the cavity of the plastic container during cooling of the plastic container following hot-filling of the container with food product; wherein further the inward flexing of the bottom surface of the container wall reduces a pressure differential between the inside of the container and atmospheric pressure when either the container is hot-filled with food product or when the container is transported from a locale of lower atmospheric pressure to higher atmospheric pressure (claim 1); and wherein further the non-flexing surface maintains the same form from prior to hot-filling or transport, wherein further the flexing surface maintains its inwardly flexed configuration following cooling of the hot-filled container (claim 1; see column 5, lines 19-27).

Jonas et al. do not disclose expressly that the plastic sheet is heated to its VICAT temperature before thermoforming.

However, Examiner takes Official Notice that it is well known to heat a plastic sheet to its VICAT temperature before thermoforming.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to heat the plastic sheet to its VICAT temperature before thermoforming since Examiner takes official notice that heating a plastic sheet to its VICAT temperature before thermoforming is well known in the plastic forming art.

The examiner recognizes that all of the claimed effects and physical properties are not positively stated by the reference(s). Note however that the references teach all of the claimed ingredients, process steps and process conditions and thus, the claimed effects and physical properties would necessarily be achieved by carrying out the disclosed process. If it is applicants' position that this would not be the case: (1) evidence would need to be presented to support applicants' position; and (2) it would be the examiner's position that the application contains inadequate disclosure in that there is no teaching as to how to obtain the claimed properties and effects by carrying out only these steps.

With respect to the preamble and content of Claim 18 about what the container is for (packaging a hot-filled food product), a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. As it is capable of performing the use, it meets the claim. It is also noted that an actual step of packaging a hot-filled food product is absent.

Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over McHenry et al (4,667,454).

With regard to claim 18, McHenry et al teach a method for forming a plastic container with a selectively deformable surface (abstract), comprising: selecting at least one polymer for a plastic container (column 4, lines 48-61); and thermoforming a container from the heated polymer (column 3, line 39); wherein the plastic container comprises: a mouth; a bottom surface; and a container wall between the mouth and the bottom surface (Figure 1A), wherein the bottom surface of the container is formed during thermoforming to consist of a curved surface contiguous to a concentric sleeve, wherein the curved surface is convex to the cavity of the container and the concentric sleeve is proximate to both the curved surface and the container wall (Figure 1A, approximately at Ref. No. 7); wherein further the concentric sleeve is substantially planar between the curved surface and the container wall (Fig. 1A, approximately at Ref. No. 9b); wherein further one of the outwardly flexed bottom surface or the container wall is configured to flex inward into the cavity of the plastic container during cooling of the plastic container following hot-filling of the container with food product (Figure 1B); wherein further the inward flexing of the bottom surface of the container wall reduces a pressure differential between the inside of the container and atmospheric pressure when either the container is hot-filled with food product or when the container is transported from a locale of lower atmospheric pressure to higher atmospheric pressure (reduction of volume will inherently perform this task); and wherein further the non-flexing surface maintains the same form from prior to hot-filling or transport, wherein

further the flexing surface maintains its inwardly flexed configuration following cooling of the hot-filled container (Figure 1A and 1B).

McHenry et al. do not disclose expressly that the plastic sheet is heated to its VICAT temperature before thermoforming.

However, Examiner takes Official Notice that it is well known to heat a plastic sheet to its VICAT temperature before thermoforming.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to heat the plastic sheet to its VICAT temperature before thermoforming since Examiner takes official notice that heating a plastic sheet to its VICAT temperature before thermoforming is well known in the plastic forming art.

The examiner recognizes that all of the claimed effects and physical properties are not positively stated by the reference(s). Note however that the references teach all of the claimed ingredients, process steps and process conditions and thus, the claimed effects and physical properties would necessarily be achieved by carrying out the disclosed process. If it is applicants' position that this would not be the case: (1) evidence would need to be presented to support applicants' position; and (2) it would be the examiner's position that the application contains inadequate disclosure in that there is no teaching as to how to obtain the claimed properties and effects by carrying out only these steps.

With respect to the preamble and content of Claim 18 about what the container is for (packaging a hot-filled food product), a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the

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prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. As it is capable of performing the use, it meets the claim. It is also noted that an actual step of packaging a hot-filled food product is absent.

Claims 18 and 29-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Agrawal et al (5,234,126).

With regard to claim 18, Agrawal et al. teach a method for forming a plastic container with a selectively deformable surface (abstract), comprising: selecting at least one polymer for a plastic container (abstract, polyester); and thermoforming a container from the heated polymer (column 6, lines 44-50); wherein the plastic container comprises: a mouth; a bottom surface; and a container wall between the mouth and the bottom surface (Figure 6), wherein the bottom surface of the container is formed during thermoforming to consist of a curved surface contiguous to a concentric sleeve, wherein the curved surface is convex to the cavity of the container and the concentric sleeve is proximate to both the curved surface and the container wall (abstract; see Fig. 3, Ref. 64 [outwardly flexed]); wherein further the concentric sleeve is substantially planar between the curved surface and the container wall (See Fig. 3 between Ref. Nos. 68 and 64); wherein further the inward flexing of the bottom surface or the container wall reduces a pressure differential between the inside of the container and atmospheric pressure when either the container is hot-filled with food product or when the container is transported from a locale of lower atmospheric pressure to higher atmospheric pressure (reduction of volume will inherently perform this task); and wherein further the

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non-flexing surface maintains the same form from prior to hot-filling or transport (see col. 10, lines 65-68).

Agrawal et al. do not disclose expressly that the plastic sheet is heated to its VICAT temperature before thermoforming.

However, Examiner takes Official Notice that it is well known to heat a plastic sheet to its VICAT temperature before thermoforming.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to heat the plastic sheet to its VICAT temperature before thermoforming since Examiner takes official notice that heating a plastic sheet to its VICAT temperature before thermoforming is well known in the plastic forming art.

The examiner recognizes that all of the claimed effects and physical properties are not positively stated by the reference(s). Note however that the references teach all of the claimed ingredients, process steps and process conditions and thus, the claimed effects and physical properties would necessarily be achieved by carrying out the disclosed process. If it is applicants' position that this would not be the case: (1) evidence would need to be presented to support applicants' position; and (2) it would be the examiner's position that the application contains inadequate disclosure in that there is no teaching as to how to obtain the claimed properties and effects by carrying out only these steps.

With respect to the preamble and content of Claim 18 about what the container is for (packaging a hot-filled food product), a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the

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prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. As it is capable of performing the use, it meets the claim. It is also noted that an actual step of packaging a hot-filled food product is absent.

With regard to claim 29, Agrawal et al teach a range of preform, neck, wall, and bottom thicknesses that anticipate the ranges described by claim 29. Agrawal et al teach that the preform may be 1250 to 5000 μm thick (column 6, lines 15-18), the wall thickness may be 250 to 900 μm thick, the bottom may be 250 to 1800 μm thick and the shoulder area may be 350-1250 μm thick (column 12, lines 52-61). For example, the equation would be satisfied if the preform were 1600 μm thick, the shoulder was 1250 μm thick, the wall was 600 μm thick and the bottom were 300 μm thick.

With regard to claim 30, Agrawal et al teach that the container does not have uniform wall thickness due to the differences in the amount of stretch in different areas. Stretching a preform with uniformly thick walls will result in a uniform decrease in thickness from the top to the bottom of the finished container.

With regard to claim 31, Agrawal et al teach the invention of claim 30 as discussed above, but does not explicitly disclose the thicknesses of 0.7 mm at the mouth, 0.28 mm near the bottom, and 0.16 mm at the bottom of the container. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have used these thicknesses, since it has been held that discovering the optimum value of a result effective variable involves only routine skill in the art and it is well known that the thickness of a container is a result effective variable

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where the result is the crush strength of the container. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

Claims 21-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jonas et al (5,234,126) as applied to claim 18 above, and further in view of Hodson et al (US 2002/0187290).

With regard to claim 21, Jonas et al teach the invention of claim 18 as discussed above, but does not explicitly teach that the circumference of the mouth is greater than the circumference of the bottom surface. Hodson et al teaches a container for food storage that can be used with a hot fill application (paragraph 0057) in which the circumference of the mouth is greater than the circumference of the bottom surface (figure 3). At the time of the invention, it would have been obvious to a person of ordinary skill in the art to create a container where the circumference of the mouth is greater than the circumference of the bottom in the process of Jonas et al. The motivation to do so would have been to facilitate easy removal of a semi-solid food product from the container.

With regard to claim 22, Jonas et al teach that the plastic/polypropylene (column 13, line 65) comprises a plastic suitable for solid phase pressure forming (column 14, line 5, thermoforming).

With regard to claim 23, Jonas et al teach the plastic further comprises polypropylene (column 13, line 65).

With regard to claim 24, Jonas et al teach the plastic further comprises a barrier enhancement agent (column 13, line 64, EVOH).

With regard to claim 25, Jonas et al teach the barrier enhancement agent comprises ethylene vinyl acetate-vinyl alcohol (column 13, line 64, EVOH).

With regard to claim 26, Hodson et al teach the plastic further comprises an adhesive suitable for solid phase pressure forming, polypropylene and EVOH (paragraph 0052).

Claim 27 is rejected under 35 U.S.C. 103(a) as being unpatentable over Jonas et al (5,234,126) in view of Hodson et al (US 2002/0187290) as applied to claim 26 above and further in view of Hope et al (5,202,192).

With regard to claim 27, Jonas et al in view of Hodson et al. teach the invention of claim 26 as discussed above, but do not explicitly teach that the adhesive contains an antioxidant. Hope et al. teach a plastic container comprising an adhesive blend containing an antioxidant (column 2, lines 66-68). At the time of the invention, it would have been obvious to a person of ordinary skill in the art to add an antioxidant to the adhesive taught by Hodson et al. The motivation to do so would have been protect the food contained in the container from oxidation.

Claim 28 is rejected under 35 U.S.C. 103(a) as being unpatentable over Jonas et al (5,234,126) in view of Hodson et al (US 2002/0187290) as applied to Claim 22 above, and further in view of McHenry et al. II (US Patent No. 4,554,190).

With respect to Claim 28 McHenry II teaches a plastic container with the components of Hodson (polypropylene, EVOH, and adhesive) (see col. 18, lines 39-42). The components are 89% PP (80-90%) (see col. 18, lines 39-42), which meets the limitations of the claim.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine McHenry II's plastic component portions with the structure taught by Jonas in view of Hodson because McHenry II's invention is within the same field of endeavor as Jonas in view of Hodson as it is directed to making plastic containers (abstract) and contains the same components (see col. 18, lines 39-42).

Response to Arguments

Applicant's arguments filed 19 May 2006 have been fully considered but they are not persuasive.

As stated on page 5, last three lines, and at additional locations within the last office action, it is well known to heat a plastic sheet to its VICAT temperature before. Since applicant has not contested this position, it is taken as concession. Therefore, the official notice is now considered admitted prior art.

As stated in on page 12, paragraph two, of the last office action, one of ordinary skill would have found it obvious to have used the thicknesses of 0.7 mm at the mouth, 0.28 mm near the bottom, and 0.16 mm at the bottom of the container because it is well known that the thickness of a container is a result effective variable where the result is the crush strength of the container. Since Applicant has not contested this position, it is taken as concession. Therefore, the optimization is now considered admitted prior art.

Applicant argues with respect to the 35 USC 102 rejections. Applicant's arguments appear to be on the grounds that:

- 1) Jonas's bottom surface is concave, not convex, after forming.
- 2) Jonas does not disclose a planar sleeve concentric to the curved surface.

3) Jonas does not acknowledge that it can perform at the temperatures and pressures specified in Claim 15 and 18.

4) McHenry's bottom surface is substantially flat, not convex, after forming.

5) McHenry does not disclose a substantially planar sleeve concentric to the curved surface.

6) McHenry does not acknowledge that it can perform at the temperatures and pressures specified in Claim 15 and 18.

7) Agrawal's bottom surface is inwardly flexed/concave as formed and not convex.

8) Agrawal does not disclose a planar sleeve concentric to the curved surface.

9) Agrawal teaches that the bottom surface can flex in and out due to its "thermoelastically deformable" region, therefore, it does not just flex in upon contraction of the material in the container.

10) Agrawal does not acknowledge that it can perform at the temperatures and pressures specified in Claim 15 and 18.

The Applicant's arguments are addressed as follows:

1) Jonas's bottom surface is convex, as seen in Figure 3 (column 5, lines 19-27; Fig. 3 [see outwardly deflected portion of bottom surface]; col. 6, lines 57-59; col. 7, lines 33-43). The text of Jonas indicates that Fig. 3 is the container as formed.

2) The planar sleeve of Jonas is shown in Fig. 2, between the area at the bottom of the structure and the flexible curved surface.

2 and 4) Given the description of "substantially planar," the Examiner interprets substantially to include minimal draft of the sleeve.

3, 6, and 10) As stated above, the ability to perform must be present in the references cited, however, the references cited are not required to show the results of specific conditions that Applicant has cited:

The examiner recognizes that all of the claimed effects and physical properties are not positively stated by the reference(s). Note however that the references teach all of the claimed ingredients, process steps and process conditions and thus, the claimed effects and physical properties would necessarily be achieved by carrying out the disclosed process. If it is applicants' position that this would not be the case: (1) evidence would need to be presented to support applicants' position; and (2) it would be the examiner's position that the application contains inadequate disclosure in that there is no teaching as to how to obtain the claimed properties and effects by carrying out only these steps.

With respect to the preamble and content of Claim 18 about what the container is for (packaging a hot-filled food product), a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. As it is capable of performing the use, it meets the claim. It is also noted that an actual step of packaging a hot-filled food product is absent.

In the absence of evidence to the contrary, the container is presumed to be capable because it has the same structure as the claimed invention.

Moreover, as the temperatures of Jonas, McHenry, and Agrawal subject the container to pass through applicant's temperature range, it demonstrates their structures' robust designs.

4) McHenry's bottom surface is convex (Figure 1A, approximately at Ref. No. 7).

5) McHenry's concentric sleeve is substantially planar between the curved surface and the container wall (Fig. 1A, approximately at Ref. No. 9b).

7) Agrawal's bottom surface is convex as formed (see Fig. 3, Ref. 64). In Fig. 3, the container is in the mold, so the shape is the as-formed convex position.

8) Agrawal's concentric sleeve is substantially planar between Ref. Nos. 68 and 64 in Fig. 3.

9) In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., flexing in but not flexing out) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Moreover, since Agrawal's the flexing is done as appropriate—going in during contraction of ingredients and out during expansion—the flexing is identical to the claimed invention. This flexing allows for the container's flexing, thus obviating failure or bucking of the balance of the structure.

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Conclusion


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Patrick Butler whose telephone number is (571) 272-8517. The examiner can normally be reached on Mo.-Th. 7:30 a.m. - 5 p.m. and alternating Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Christina Johnson can be reached on (571) 272-1176. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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